

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
IP-Enabled Services)	WC Docket No. 04-36
)	

**REPLY COMMENTS OF THE UNITED STATES CONFERENCE OF
CATHOLIC BISHOPS, ALLIANCE FOR COMMUNITY MEDIA,
APPALACHIAN PEOPLE’S ACTION COALITION, CENTER FOR DIGITAL
DEMOCRACY, CONSUMER ACTION, EDMONT NEIGHBORHOOD
COALITION AND MIGRANT LEGAL ACTION PROGRAM**

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SUMMARY

The United States Conference of Catholic Bishops (“USCCB”), Alliance for Community Media, Appalachian People’s Action Coalition, Center for Digital Democracy, Consumer Action, Edgemont Neighborhood Coalition and the Migrant Legal Action Program (“USCCB, *et al.*”), through their attorneys, the Institute for Public Representation (“IPR”), believe that the Commission must act promptly, within the confines of this proceeding, to make certain that all providers of voice over Internet protocol (“VoIP”) services that are the functional equivalent of traditional telephone services make an equitable contribution to the Universal Service Fund (“USF”).

The FCC must ensure that functionally equivalent VoIP providers contribute fully to the USF and not be allowed to pay indirectly through the facilities-based carriers that provided access. To do otherwise would permit VoIP providers to avoid paying directly into the USF while facilities-based carriers would be required to contribute in full. It is also in contravention with the current FCC practice of assessing USF contributions only on consumer end-user sales, not on sales to resellers.

While the actual VoIP rates may be lower than tradition wireline offerings, there are many consumers that cannot get access to the computer equipment or afford the broadband connection that most VoIP services require. In any event, many low-income and elderly Americans are unaware of VoIP and its benefits.

The Commission should not defer its decision to the contribution methodology proceeding. Delaying a decision will only increase the amount of universal service funds that VoIP providers are siphoning from the USF pool. It also unnecessarily removes the issue from a proceeding that was specifically intended to determine what obligations IP-

enabled services have to the USF. When the Commission does consider altering the USF contribution mechanism, it should adopt an all-revenue approach that avoids the many practical and statutory problems that the numbers- and connection-based methodologies raise.

TABLE OF CONTENTS

SUMMARY	ii
I. THE FCC MUST ACT TO ENSURE THAT FUNCTIONALLY EQUIVALENT VOIP PROVIDERS FAIRLY CONTRIBUTE TO THE USF	2
A. Functionally Equivalent VoIP Providers Must Contribute to the USF Based on the Revenue From Their End Users.....	2
B. Even if VoIP Services are More Efficient and Less Expensive, a Significant Number of Consumers will be Harmed if These Providers do not Fairly Contribute to the USF	4
II. THE COMMISSION SHOULD NOT DEFER ITS DECISION ON VOIP UNTIL IT RESOLVES THE METHODOLOGY PROCEEDING	6
A. There is no Reason for the Commission to Defer its Decision on Determining that Functionally Equivalent VoIP Providers Should Contribute to the USF	8
B. The Commission Should not Adopt a Connections-Based USF Methodology	9
CONCLUSION.....	10

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COMMENTS OF USCCB, *et al.*

The United States Conference of Catholic Bishops (“USCCB”), Alliance for Community Media, Appalachian People’s Action Coalition, Center for Digital Democracy, Consumer Action, Edgemont Neighborhood Coalition and the Migrant Legal Action Program (“USCCB, *et al.*”),¹ through their attorneys, the Institute for Public Representation (“IPR”), submit reply comments in response to the *IP-Enabled Services Notice of Proposed Rulemaking*.²

These reply comments are limited to responding to the issues of how voice over Internet protocol (“VoIP”) services should be classified under the Communications Act and how the regulatory classification affects the Commission’s ability to fund universal service. In our initial comments, we demonstrated that universal service will be undermined unless the providers of VoIP services that are functionally equivalent to traditional telephone service are required to make equitable contributions to the Universal Service Fund (“USF”).³ We further showed that the Commission had statutory authority

¹ USCCB, *et al.* are religious and non-profit organizations that advocate for the interests of low-income individuals and families.

² *IP-Enabled Services, Notice of Proposed Rulemaking*, WC Docket No. 04-36, FCC 04-28 (rel. March 10, 2004)(“*Notice*”).

³ Functionally equivalent VoIP services are those services that (1) provide instantaneous, real-time communication; (2) use regular telephone numbers to place and receive calls;

to require such contributions. Thus, USCCB, *et al.* strongly urged the Commission to require VoIP services that provide the functional equivalent of telephone service to support universal service.

I. THE FCC MUST ACT TO ENSURE THAT FUNCTIONALLY EQUIVALENT VOIP PROVIDERS FAIRLY CONTRIBUTE TO THE USF

Commenters make two basic arguments that the Commission should not require IP-enabled services contribute to the USF. Some assert that VoIP providers are already indirectly contributing to the USF.⁴ Others claim that VoIP service is less expensive than traditional USF-subsidized telephony.⁵ Neither argument presents a valid reason for the FCC to exempt VoIP providers from contributing to the USF.

A. Functionally Equivalent VoIP Providers Must Contribute to the USF Based on the Revenue From Their End Users

Some commenters argue that some VoIP providers already contribute to USF support mechanisms indirectly when they purchase underlying private lines from common carriers and the USF assessment is “passed through.”⁶ This is not, however, an

(3) interconnect with the PSTN; (4) are offered to the general public; and (5) are offered for a fee.

⁴ Ad Hoc Telecommunications Users Committee Comments at 4 (“Ad Hoc Comments”); CompTel/ASCENT Comments at 18; Covad Communications Comments at 28 (“Covad Comments”); Dialpad Communications, Inc., ICG Communications, Inc., Qovia, Inc., and Voicepulse, Inc. Comments at 12 (“*Dialpad, et al.* Comments”); Vonage Holdings Corp. Comments at 47 (“Vonage Comments”); Qwest Communications International Inc. Comments at 46-47 (“Qwest Comments”).

⁵ 8x8, Inc. Comments at 20, 28; CTIA Comments at 13.

⁶ They note that facilities-based carriers providing the telecommunications services to VoIP providers report the revenue as end-user sales and then pass the accompanying USF assessments onto the non-facilities-based VoIP providers. *See* Vonage Comments at 47-48. Other commenters have suggested that the FCC should adopt a “layers” model for regulating IP-enabled services. 8x8, Inc. Comments at 6-10; AT&T Comments at 15-28; Covad Comments at 5-12; MCI Comments at 6-12; PointOne Comments at 18-26;

equitable way to determine how much end-user revenue should be allotted to maintain the USF since facilities-based telecommunications carriers will be required to contribute to the USF while other functionally equivalent VoIP providers will not.⁷ The Commission should ensure that the actual *consumer* end-user revenue from all functionally equivalent VoIP providers is counted toward the USF contribution base.

Currently, USF contributions are assessed on providers of telecommunications services based on revenues derived from end-users, regardless of whether the provider is a reseller or provides the services over their own facilities.⁸ Facilities-based carriers distinguish sales to end users and sales to resellers and assess contributions only on the retail end-user sales. Resellers then assess contributions based on *their* end-user revenue. This same methodology should apply in relation to functionally equivalent VoIP providers to maintain a contribution scheme that is competitively neutral, nondiscriminatory and without incentives that encourage businesses to alter their business practices to avoid regulatory obligations.

The Commission is required to establish USF support mechanisms that assess telecommunications carriers on “an equitable and nondiscriminatory” basis.⁹ Although

Vonage Comments at 4-13. Under this model, the Commission would regulate only on the bottom “physical layer”—not the IP-enabled services layered over it. *See, e.g.*, MCI Comments at 48-49. Like the “pass through” assessment scheme, this means that the USF funding requirement and contribution mechanism will only reach those furnishing the underlying broadband access and not the VoIP service providers.

⁷ Furthermore, some VoIP providers completely bypass the traditional network and just connect through the Internet, avoiding any “pass through” contribution to the USF.

⁸ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9197, 9207-08 (1997).

⁹ 47 U.S.C. § 254(b)(4) (requiring the Commission to establish a USF assessment system based upon the principle that “[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service”); 47 U.S.C. § 254(d) (“Every telecommunications

not all providers of functionally-equivalent VoIP services are telecommunications carriers and thus under the mandate of Section 254, the Commission's broad authority through its ancillary jurisdiction provides the means for the Commission to require all functionally-equivalent VoIP providers to equitably support the USF.¹⁰ These VoIP providers should not be treated differently than traditional wireline carriers and should contribute to the USF in an equitable manner. By assessing end users of facilities-based carriers and not resellers of functionally equivalent VoIP, the Commission is requiring these carriers to pay far more into the USF. This cannot be considered "equitable and nondiscriminatory" in its treatment of carriers.¹¹

Furthermore, treating functionally equivalent VoIP services differently would give those competitors artificial advantages in the marketplace and provide incentives for competitors to base decisions on regulatory avoidance rather than other business factors.

B. Even if VoIP Services are More Efficient and Less Expensive, a Significant Number of Consumers will be Harmed if These Providers do not Fairly Contribute to the USF

Some commenters argue that the USF is not needed since VoIP services can be provided more cost-effectively than carriers' traditional voice offerings.¹² Even if rates

carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.").

¹⁰ USCCB, *et al.* Comments at 29-35.

¹¹ Similarly, the Commission also established the principle that universal service support mechanisms and rules should be competitively neutral. *1997 Universal Service Order*, 12 FCC Rcd at 8801. This means that USF procedures "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *Id.* at 8802. Here, providers that use Internet technology to transmit voice conversations are clearly favored over traditional wireline carriers since they are currently exempt from USF obligations.

¹² 8x8, Inc. Comments at 20, 28; CTIA Comments at 13.

are lower, however, many consumers cannot get VoIP service because of equipment costs, inaccessibility to broadband service and a lack of knowledge about VoIP services.¹³

Most VoIP plans require that customers own a computer and have access to broadband service, costing an average \$39 a month.¹⁴ Some providers of VoIP require that subscribers have their “premium” broadband plans which cost even more.¹⁵ Indeed, the consumers that USF was intended to assist—the low-income and high-cost consumers—are less likely to have access to the broadband-equipped computers that VoIP plans require.¹⁶

Furthermore, many consumers—especially women, older Americans, and low-income consumers—are not even aware of VoIP. A June 2004 survey found that those who have heard about VoIP are “well-educated, willing to try new things, and able to troubleshoot hassles that may arise in adopting new technologies.”¹⁷ Demographically, those familiar with VoIP are two-thirds more likely to be men, between 25 and 34, and

¹³ While VoIP will reduce the cost of communication for consumers, this is only true for consumers who already have access to cable or broadband service. USCCB, *et al.* Comments at 6-7.

¹⁴ John B. Horrigan, *55% of Adult Internet Users Have Broadband at Home or Work*, Pew Internet and American Life Project, 5 (April 2004) available at http://www.pewinternet.org/pdfs/PIP_Broadband04.DataMemo.pdf.

¹⁵ For instance, Cablevision offers unlimited, local and long distance VoIP calls for \$34.95 a month. It is only available, however, to those who subscribe to Cablevision’s Optimum Online service which costs around \$45 to \$50, depending on whether subscribers also get Cablevision cable. Cablevision website, <http://www.optimumonline.com/index.jhtml;jsessionid=VAMP25TJMLNNYCQLASDSF3QKBMCI5G?pageType=pricing>.

¹⁶ USCCB, *et al.* Comments at 6-8.

¹⁷ John B. Horrigan & Allen Hepner, *27% of Online Americans have heard of VOIP Telephone Service; 4 Million are Considering Getting it at Home*, Pew Internet and American Life Project, 2 (April 2004) available at http://www.pewinternet.org/pdfs/PIP_VOIP_DataMemo.pdf.

well-off economically.¹⁸ Thus, even if functionally-equivalent VoIP services are more cost-effective than traditional telephony, the Americans that would benefit from VoIP technology the most are likely to be unfamiliar with the technology.

Functional equivalent VoIP providers have the same obligation to contribute to the USF as other providers of telecommunications, even if they do not need the funds themselves for high-cost support. MCI notes that VoIP is “not sensitive to distance” and therefore does not need to contribute or receive funds from the USF since the purpose of universal service is to “build networks and provide service to rural and under-served areas.”¹⁹ This argument ignores the fact that VoIP services rely on the existing physical infrastructure that is supported by USF.²⁰ It also ignores the fact that the fund is used not only for high-cost support but to subsidize the Lifeline and Link-Up programs, provide funds for technology and equipment to schools, libraries and rural health care providers, and could be used for a variety of uses in the future, including spurring the use of advanced services.²¹

II. THE COMMISSION SHOULD NOT DEFER ITS DECISION ON VOIP UNTIL IT RESOLVES THE METHODOLOGY PROCEEDING

Several commenters noted that the Commission should defer its decision on VoIP providers contributing to the USF to the separate USF methodology proceeding²² with

¹⁸ *Id.*

¹⁹ MCI Comments at 49.

²⁰ *See Notice* at ¶¶ 3, 8.

²¹ *See* USCCB, *et al.* Comments at 3-10.

²² *Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24,952 (2002) (“*USF Contribution Methodology NPRM*”). These commenters include Ad Hoc Comments at 14-18; AT&T Comments at 37-38, BT Americas Inc. Comments at 7-8; Cablevision Systems Corp.

most advocating for the adoption of a numbers- or connections-based methodology. USCCB, *et al.* believe, however, that the Commission should not put off the determination that VoIP providers should contribute to the USF since waiting will only extend the time that funds are being siphoned away from the USF by VoIP technology. This proceeding is the proper forum to determine, as a baseline, that certain VoIP providers should contribute to the USF. Furthermore, with the revolutionary rise in VoIP technology, it makes more sense for the Commission to adopt an all-revenue approach in establishing a revised contribution methodology.

Without FCC action, funding for universal service will decline as more businesses and consumers begin using VoIP as their primary telephone service.²³ Some predict that the involvement of major telecommunications carriers may mean that 30 percent of homes in the U.S. could begin subscribing to VoIP over the next three years.²⁴ Indeed, nearly 1 million consumers in the United States are expected to subscribe to Internet calling services by the end of the year.²⁵ As USCCB, *et al.* noted in their initial comments, this will have a significant impact on the amount of funding that reaches the USF.²⁶

Comments at 13; Level 3 Communications LLC Comments at vi, 22-24; MCI Comments at 49-50; Net2Phone, Inc. Comments at 25-26; Qwest Comments at 47.

²³ See USCCB, *et al.* Comments at 11-13.

²⁴ Ken Belson, *Phone Giants Are Projected to Dominate Internet Calls*, New York Times, June 14, 2004, at C5.

²⁵ Christopher Rhoads, *Concerns Arise as Internet Callers Pick Own Area Codes*, Wall St. J., June 8, 2004, at B1.

²⁶ See, e.g., USCCB, *et al.* Comments at 12. The rapid growth of the VoIP industry and involvement and investment of major telecommunications carriers in the market should dispel any argument that this technology is in its “infancy” and should not be subjected to government regulation. See, e.g., 8x8, Inc. Comments at 26; *Dialpad, et al.* Comments at 18. Furthermore, the USF will suffer disproportionately from increased VoIP use since

A. There is no Reason for the Commission to Defer its Decision on Determining that Functionally Equivalent VoIP Providers Should Contribute to the USF

The issues raised in the IP-enabled services proceedings are not “inextricably linked” to issues raised in the methodology proceedings.²⁷ Indeed, determining in this proceeding that certain IP-enabled services should contribute to the USF will only add clarity to the debate on a revised USF methodology. The Commission noted that VoIP was problematic to resolving the USF methodology debate.²⁸ By having a set policy that clearly establishes that functionally equivalent VoIP providers are equitably contributing to the USF, the Commission is free to concentrate on other issues associated with revising the USF methodology.

Further, determining that VoIP providers should equitably contribute to the USF will not affect any arguments associated with the adoption of a connections- or numbers-based methodology. Since these new methodologies are based on connections to the public voice communications network or on providers’ use of NANPA numbering resources, functionally equivalent VoIP providers would, by definition, already be

the businesses and consumers switching to VoIP are likely the largest interstate and international users trying to avoid the higher rates and associated regulatory fees.

²⁷ AT&T Comments at 37-38.

²⁸ *USF Contribution Methodology NPRM* at ¶ 3 (“Customers also are migrating to . . . Internet-based services. As we recently noted, these changes have led to fluctuations in the contribution base and rising contribution obligations.”); *Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752, 3758 (2002) (“The accelerating development of new technologies like ‘voice over Internet’ increases the strain on regulatory distinctions such as interstate/intrastate and telecommunications/non-telecommunications, and may reduce the overall amount of assessable revenues reported under the current system.”).

included among the carriers contributing to the USF under USCCB, *et al.*'s functionally equivalent approach.²⁹

The IP-enabled services proceeding is also the best venue for the Commission to determine whether USF obligations apply to VoIP providers. The *Notice* specifically inquires about how the regulatory classification of IP-enabled services would affect the Commission's ability to fund universal service and queues up the appropriate questions.³⁰ It specifically leaves questions about reforming the current methodology to the USF methodology proceeding.³¹

**B. The Commission Should not Adopt a
Connections-Based USF Methodology**

Although USCCB, *et al.* do not believe that the FCC should defer its decision to the contribution methodology proceeding, several commenters have noted that the rise in demand for IP-enabled services makes it even more imperative that the Commission adopt the numbers- or connections-based methodology.³² While the rise in demand for VoIP services makes any reform to the USF methodology more urgent, it does not require abandoning the current revenue-based methodology. Indeed, in light of the transition from wireline telecommunications to more efficient VoIP technology, it is more sensible for the Commission to adopt an all-revenue based methodology that takes into account VoIP's ubiquitous nature, is easy to administer, and ensures that carrier and

²⁹ Among the criteria that is required for VoIP services to be functionally equivalent to traditional telephone service is connecting to the PSTN and using the normal telephone numbering system to place and receive calls. USCCB, *et al.* Comments at 13-16.

³⁰ *Notice* at 43-46.

³¹ *Id.* at 43.

³² Ad Hoc Comments at 14-18; AT&T Comments at 37-40; BT Americas Inc. Comments at 7-8; Level 3 Communications LLC Comments at 23-24; MCI Comments at 49-50;

consumer USF obligations remained equitably based upon their actual usage of telecommunication services.³³

Furthermore, the emergence of VoIP does not favor the adoption of a numbers- or connections-based plan since these methodologies will have the same flaws noted by commenters in the USF methodology proceeding when VoIP becomes more prevalent.³⁴ Low-income consumers and the providers that serve them will continue to contribute unfairly to the USF under a regressive numbers- or connections-based regime regardless of the increase in VoIP usage, in violation of the principles established in Section 254.³⁵

CONCLUSION

The Commission should not put off its determination that certain IP-enabled services must contribute to the USF, but rather act promptly to ensure that all functionally equivalent VoIP providers contribute to the USF based on revenue from their retail end-users. The Commission should not wait on the contribution methodology proceeding to make this determination and, when it does alter this mechanism, adopt an all-revenue

Pac-West Telecomm, Inc. Comments at 22; PointOne Comments at 36-37; VON Coalition at 27-28.

³³ USCCB, *et al.* Comments at 35-38.

³⁴ *See, e.g.,* CU *et al.* *USF Contribution Methodology NPRM* Comments at 4-15; CU *et al.* *USF Contribution Methodology NPRM* Reply Comments at 2-5; TracFone *USF Contribution Methodology NPRM* Comments at 17-30; TracFone *USF Contribution Methodology NPRM* Reply Comments at 14-24.

³⁵ 47 U.S.C. § 254(b)(1) (requiring “[q]uality services should be available at just, reasonable, and affordable rates.”); 47 U.S.C. § 254(b)(4) (requiring the Commission to establish a USF assessment system based upon the principle that “[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service”); 47 U.S.C. § 254(d) (“Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.”).

approach that does not suffer from the flaws associated with a regressive numbers- or connections-based approach.

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